IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NEW CENTURY HOMES, INC.	**:**	**CIVIL ACTION**
AND JOHN BERG	**:**	
	:	
V.	**:**	
	:	
FIDELITY NATIONAL TITLE	**:**	
INSURANCE COMPANY OF	**:**	
NEW YORK	**:**	NO. 99-5043

M E M 0 R A N D U M

WALDMAN, J. **September 29, 2000**

This is a declaratory judgment action. Jurisdiction is premised on diversity of citizenship. Defendant has moved for summary judgment. The pertinent facts concerning this action are undisputed, although the parties differ as to the legal consequences.

Defendant ("Fidelity") is the assignee of a judgment obtained by Mountain Funding, Inc. ("Mountain") against plaintiff New Century Homes, Inc. ("New Century") for default on certain loans. On July 17, 1996 New Century entered into a loan agreement ("Loan Agreement") with Mountain to finance (i) the subdivision of certain development properties ("Properties") into building lots and (ii) the fabrication on the lots of modular housing units for sale. Under this Loan Agreement Mountain provided New Century with two loans totaling $1,000,000, an $800,000 construction loan and a $200,000 development loan(collectively the "Loans"). As collateral for the loan, New Century provided Mountain with mortgages encumbering the Properties (the "Mortgages") and two promissory notes (the "Notes"), one for each loan.

Contemporaneous with the Loan Agreement, plaintiff Berg and Mountain entered an agreement whereby Berg guaranteed payment of the loans (the "Guaranty"). In the section of the Guaranty called "Obligations Unconditional" the parties agree that:

> [t]he liability of the Guarantor hereunder shall be absolute and unconditional irrespective of:..... (i) any lack of validity or enforceability of any such Loan Document or any agreement or instrument relating thereto, including, without limitation, the lack of validity or enforceability of all or any portion of the liens or security interests granted thereby . . . (iii) any exchange or release of, or non-perfection of any lien on or security interest in, any collateral, or any release or amendment or waiver of or consent to any departure from the terms of any other guaranty for all or any of the Obligations.

At the closing of the Loans, Fidelity issued Mountain mortgagee title insurance policies insuring the liens of the

Mortgages.

New Century subsequently developed the Properties and sold them. Fidelity issued title insurance policies to the respective purchasers of each lot and their lenders, insuring ownership free and clear of Mountain's Mortgages. When New Century later defaulted on the Loans, Mountain executed the warrant of attorney in the Guaranty and a judgment was entered against Berg in the Philadelphia Common Pleas Court in the amount of $852,578.25 in December 1997.

On December 15, 1997 Mountain commenced an action against Fidelity in federal court and also threatened to foreclose on properties which had been insured by Fidelity. On June 18, 1998 Fidelity and Mountain entered a settlement agreement by which Mountain assigned to Fidelity its interest in the Mortgages, the Guaranty, the Notes and the Judgment for consideration of $800,000. Upon executing the settlement, Fidelity recorded releases for the Mortgages.

In this declaratory judgment action plaintiffs now seek a declaration that Fidelity's release of the Mortgages as partial collateral for New Century's debt served to discharge New Century's obligations to Fidelity as assignor of the Judgment and consequently release Berg from his obligations under the Guaranty.

This action appears to be nothing more than a strained attempt to avoid liability on a guaranty and valid judgment under a dubious legal theory.

Plaintiffs maintain that Pennsylvania law holds that the release of a mortgage held as security upon a debt releases any notes or bonds' held in conjunction with the mortgage. In support of their position they rely on In re Purman's Estate, 5 A.2d 906 (Pa. 1939) and Neale v. Dempster, 36 A. 338 (Pa. 1897).

'The two terms are used interchangeably.

Plaintiffs cite a portion of a passage first appearing in Dempster and reiterated in Purman's Estate to support their position. It reads:

> [a] bond and mortgage taken for the same debt, though distinct securities, possessing similar

> attributes, . . . are, nevertheless, so far one.that payment of either discharges both, and a release or extinguishment of either without actual payment is a discharge of the other, unless otherwise intended by the parties.

Demipster, 36 A. at 339; accord Purman's Estate, 5 A.2d at 907. Upon review of these opinions, however, it appears that this language has been removed from the context and, if anything, the cases undermine plaintiffs' position. In both cases, the defendants were released from the obligation to pay because they had already paid the underlying debt. Thus, these cases merely stand for the unremarkable proposition that a lender cannot collect twice upon the same debt, once in equity and then again in law.

In Dempster, the origin of the passage plaintiffs rely so heavily upon, the defendant borrowed a sum of money from the plaintiff to purchase property. A mortgage and bond were executed as security on the loan. A provision of the loan agreement stated that for every $1,000 of the loan that he repaid, the defendant could choose a specific acre of the property to be released from the mortgage. Defendant had repaid $20,000 of the loan and had designated 20 acres of the land to be released from the mortgage before the action was commenced. The lower court found that, despite the above provision, the entire property (including the released portion) was subject to the bond. In pointing out the unsoundness of this position (which would completely vitiate the purpose of the release provision), the Court uttered the language upon which plaintiffs rely. The passage, however, is taken out of context.

The paragraph preceding the language cited by the plaintiffs explains the actual thinking of the Court. It reads:

> [t]he principle that the discharge of a mortgage by an entry of satisfaction on the record, is a discharge of the debt it was given to secure, and hence discharges the bond or other evidence of the debt, is also perfectly familiar doctrine. Of course, if the entry of satisfaction was not intended as discharge of the debt, the mortgagee, upon showing that fact, is entitled to prosecute his bond or other security, and collect his money. But, if the debt has actually been paid, then the bond is discharged, as well as the mortgage, by an entry of satisfaction. Thus, it may easily happen that a mortgage creditor may be willing to relieve his debtor's land from the lien of the mortgage when the debt is not paid, in order to enable the debtor to sell the land divested of the mortgage; and, whenever that is the fact, it may be shown, and the debt remain intact, notwithstanding an entry of satisfaction of the record of the mortgage.

Demipster, 36 A. at 339 (emphasis added). The underlying issue addressed in Dempster and quoted in Purman's Estate, which plaintiffs completely omit from their analysis, focuses on the payment of the

debt: "[b]ut if the debt itself be paid, there is no question at all that the discharge of the mortgage discharges the bond, as well as the mortgage." Purman's Estate, 5 A.2d at 907 (quoting Dempster, 36 A. at 339).

In this case, the release of the Mortgages had nothing to do with New Century's payment of its debt. Even assuming plaintiffs correctly assert that defendant received value from the release of the Mortgages by extinguishing potential liability, such facts do not allow plaintiffs to be unjustly enriched in excess of $800,000 by erasing their debt.

Even assuming that New Century is correct when it asserts that its debt should be discharged "without actual payment" absent its prior consent, New Century did manifest consent through the Loan Agreement. Section 10.1 of the Loan Agreement entitled "Remedies Cumulative; No Waiver" reads as follows:

> The rights, powers and remedies of Lender provided in this Agreement and the other Loan Documents are cumulative and not exclusive of any right, power or remedy provided by law or equity, and no failure or delay on the part of Lender in the exercise of any right, power or remedy shall operate as a waiver thereof, nor shall any single partial exercise of any right, power or remedy preclude other or further exercise thereof, or the exercise of any other right, power or remedy.

The Loan Agreement reserves defendant's right to select its remedies without jeopardizing any other remedy. This is consistent with Pennsylvania law. See Elmwood Federal Savings Bank v. Parker, 666 A.2d 721, 724 n.6 (Pa. Super. Ct. 1995) (creditor holds the right to either foreclose upon a mortgage or enforce the unpaid bond or both but may "only have one satisfaction").

In no case applying Pennsylvania law has a court held that a lender's release of some of a debtor's collateral without payment served to extinguish the debt.

Mr. Berg's argument that he should be released from his obligations under the Guaranty because the underlying debt has been "satisfied" fails by its own presumption as the underlying debt has not been satisfied. Moreover, even assuming that New Century was relieved of its obligations because of Fidelity's release of the Mortgages, Berg would still be responsible for the debt under the terms of the

Guaranty.

Berg cites to Keystone Bank v. Flooring Specialists, Inc., 518 A.2d 1179, 1184 (Pa. 1986) for the proposition that "if a creditor surrenders or impairs collateral which serves as security for the principles' debt, the surety is discharged from the obligation." The very next sentence of the opinion,, however, states that "[a]s with other suretyship defenses, if the surety consented to the creditor's surrender, release or impairment of collateral, there would be no discharge of the surety's obligation."" Id. at 1184-85. See also Warner Lambert Pharm. Co. v. Sylk., 348 F. Supp. 1039, 1045 (E.D. Pa. 1971) ("Indeed, even without such consent, if the creditor reserves its rights against a surety, the surety is not discharged") (citations omitted).

The Guaranty executed between Berg and Fidelity plainly states that Berg's liability shall be "absolute and unconditional irrespective of any exchange or release of, or non-perfection of any lien on or security interest in, any collateral."

Plaintiffs' suggestion that the absolute and unconditional liability section of the Guaranty merely afforded the lender (Mountain and then Fidelity) the opportunity to release collateral for payment which would then be credited to the final debt subject to the Guaranty. This would render the section superfluous and is untenable. By law Fidelity already had the right to foreclose On the Mortgages upon default and, in such case, would have been obligated to credit any amount received from such action to the final debt owed.

The plain language of the Guaranty holds Berg liable for New Century's debt regardless of Fidelity's release of the Mortgages. Plaintiffs have presented nothing from which one could reasonably conclude that they are relieved of liability under or as a result of the Judgment. They have failed to make any showing of entitlement to the declaration they seek.

Accordingly, defendant's motion will be granted. An appropriate order will be entered.

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0 R D E R

AND NOW, this - day of September, 2000, upon consideration of defendant's Motion for Summary Judgment (Doc. #4, Part 2), plaintiffs' response and the record herein, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly, **JUDgemeNT is ENTERED** in the above action for the defendant.

BY THE COURT:

JAY C. WALDMAN, J.